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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, EX REL, ROY E. MILLER; THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, SECRETARY OF STATE, *Respondents*

REPLY BRIEF OF THE RESPONDENT STARK COUNTY BOARD OF ELECTIONS TO THE PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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REPLY BRIEF OF THE RESPONDENT STARK COUNTY BOARD OF ELECTIONS TO THE PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STATEMENT OF THE CASE

The Respondent, the Stark County Board of Elections, is charged with the responsibility of conducting the election for the office of Judge of the Canton Municipal Court for the new term commencing January 2, 1970.

In Ohio the chief election officer is the Secretary of State, *Section 3501.04, Revised Code of the State of Ohio.* (Appendix A-1) The County Board Elections is an appointed body of four members. Two from each of the two major political parties are appointed by the Secretary of State, *Section 3501.06, Revised Code of the State of Ohio,* (Appendix A-1) after receiving a recommendation from the political party organization. *Section 3501.07, Revised Code of the State of Ohio.* (Appendix A-1)

The county prosecuting attorney is the legal adviser of the Board of Elections and in that capacity submits this brief.

Candidates for the office of Judge of the Canton Municipal Court appear on a non-partisan ballot in the general election conducted in November. The candidates secure their position on the non-partisan ballot at the general election in November by either filing as an independent candidate pursuant to *Section 1901.07 of the Revised Code of Ohio,* (Appendix A-2) or by winning nomination at the party primary be it the Republican Party or the Democratic Party in the May primary and again pursuant to the provisions of *Section 1901.07 of the Revised Code of Ohio.*

In the election process conducted to date for the office of Judge of the Canton Municipal Court for the term beginning January 2, 1970, no independent candidate petitions were filed, but three party nominating petitions were filed. Two were filed for the Republican nomination and a Republican primary election was held on the 6th day of May. Harold DeHoff was declared the winner and issued a certificate of nomination as the Republican candidate, and his name

will appear on the non-partisan ballot at the November 4, 1969, general election.

The petitioner filed a nominating petition on January 22, 1969, seeking nomination as the Democratic Candidate for the Office of Judge of the Canton Municipal Court. (Appendix A-6) As no other person filed nominating petitions for nomination as the Democratic Party nominee other than the petitioner, and as the petitioner was the only candidate qualifying for nomination in the Democratic primary for office of Judge of the Canton Municipal Court, no ballot for that office was submitted to the Democratic Party voters at the May primary pursuant to the provisions of *Section 1901.07 and 3513.02 of the Ohio Revised Code.* (Appendix A-2 and Appendix A-3)

Although the petitioner was entitled to a certificate of nomination after 4:00 p.m. on the ninetieth day before the primary election of 1969 pursuant to the provisions of *Sections 1901.07 and 3513.02 of the Revised Code of Ohio,* no certificate of nomination was issued the petitioner prior to the primary election.

On April 30, 1969, some six days before the May primary the Supreme Court of Ohio announced its decision in *State ex rel Graves* vs. *Brown,* 18 O.S. 2d 51, 1969 (Appendix B-2, page 11-A of petitioner's brief) in which Judge Zona, a candidate for re-election to the Parma Municipal Court, and then 70 was denied a place on the May primary ballot for the reason that he was no longer qualified to hold the office due to his age and application of Section 6(C) of Article IV of the Ohio Constitution as amended May 7, 1968. (Appendix A-2, page 1-a of petitioner's brief)

Following the May, 1969, primary and before the Respondent Board of Elections decided whether to

issue a certificate of nomination to the petitioner, an original action in prohibition was filed in the Supreme Court Ohio by the Respondent Roy Miller (*State ex rel Miller* vs. *Gwin,* 18 O.S. 2d 66 (1969)) praying for the following orders:

> "(1) That a Writ of Prohibition issue against the Respondents, Ted W. Brown and the members of the Board of Elections of Stark County, Ohio, from issuing a certificate of nomination for the office of Judge of the Canton Municipal Court to Judge Clay E. Hunter.
>
> "(2) That the Respondents, members of the Board of Elections, Stark County, Ohio, be prohibited from placing the name of Judge Clay E. Hunter on the ballot as a candidate for Judge of the Municipal Court of Canton, Ohio, in the November, 1969, general election.
>
> "(3) That the Respondents Stark County Board of Elections and Ted W. Brown be prohibited from substituting on the ballot for the November, 1969, general election, a Democratic candidate for election as Judge of the Canton Municipal Court where no eligible candidate was nominated for said office.
>
> "(4) That the Respondents Stark County Board of Elections and Ted W. Brown be prohibited from submitting to the voters within the jurisdiction of the Canton Municipal Court a ballot containing the name of Clay E. Hunter or any other name substituted therefor by the Respondents the Stark County Board of Elections.
>
> "(5) For such other orders and relief as may be proper in the premises."

In that action this Respondent was also a Respondent and filed a demurrer together with an agreed statement of facts. (Appendix A-8) Specifically, the

Respondent Stark County Board of Elections contended as follows:

> "(1) The Board of Elections should not be prohibited from issuing a Certificate of Nomination to the Honorable Judge Clay E. Hunter.
>
> "(2) In the event it is the decision of the Supreme Court of Ohio that a Certificate of Nomination should not be issued to the Honorable Judge Clay E. Hunter, then the Democratic Party pursuant to the provisions of *R.C. 3513.31* should be permitted to select a Candidate as a substitute for the Honorable Judge Clay E. Hunter for the office of Judge of the Canton Municipal Court at the general election of November, 1969."

In taking and briefing this position in the Supreme Court of Ohio the Respondent Board of Elections attempted to provide the Supreme Court of Ohio with arguments contrary to those being advanced by the petitioner Roy E. Miller in view of the fact that the petitioner Clay E. Hunter was not joined nor did he intervene, nor was any adversary position presented by any other party.

On the issue of whether the Democratic Party through its central committeemen in the geographical area comprising the Canton Municipal Court could substitute a candidate for the petitioner Clay E. Hunter, the Supreme Court of Ohio ruled that the relief sought by Roy Miller to deny this right to the Democratic Party was "premature". (Appendix B-1, page 10a of petitioner's brief.)

Subsequent to the June 18, 1969, opinion by the Ohio Supreme Court in *Miller* vs. *Gwin,* ibid., the Respondent Stark County Board of Elections met on July 1, 1969, and a motion to issue a certificate of nomi-

nation to the petitioner Clay E. Hunter resulted in a vote of two "yes" and two "no".

On July 7, 1969, the Respondent Ted W. Brown, Secretary of State, acting pursuant to the powers vested in him by *Section 3501.11 of the Ohio Revised Code* (Appendix A-4) broke the tie vote on the issue of whether to issue a certificate of nomination to the petitioner Clay Hunter by voting "no". (Appendix A-19)

On August 15, 1969, the Stark County Board of Elections received written notice (Appendix A-22) from the Stark County Democratic Central Committee to the effect that Anthony Flex had been unanimously selected by the committeemen of the said Stark County Democratic Central Committee as a candidate for the Canton Municipal Court Judge in the said Canton Municipal Court District to fill the vacancy "created by the Supreme Court of Ohio decision removing the name of Clay Hunter from the race", together with a signed statement from the said Anthony Flex accepting and consenting to be a candidate for said office, all of which was done in attempted compliance with the provisions of *Section 3513.31 of the Revised Code of Ohio* (Appendix A-5) and obviously in keeping with the argument made by the respondent Board of Elections in the case of *Miller* vs. *Gwin,* ibid. (Appendix A-8)

August 19, 1969, the Respondent Stark County Board of Elections met and received the communication from the Democratic Committee Organization of the Canton Municipal Court subdivision of the Stark County Democratic Central Committee. A motion was made to place the name of Anthony Flex on the ballot

as the Democratic party candidate in the election for judge of the Canton Municipal Court for the term beginning January 2, 1970. The vote on the motion was again two "yes" and two "no".

The Respondent Ted W. Brown, the Secretary of State of Ohio in interpreting *Section 3513.31 of the Revised Code of Ohio* (Appendix A-5), ruled that no "vacancy" permitting replacement existed and broke the tie vote by voting "no" on the motion to place the name of Anthony Flex as the Democratic Party candidate on the non-partisan ballot for the November election for the office of Judge of the Canton Municipal Court. (Appendix A-24)

In a meeting of the Respondent Stark County Board of Elections held on September 2, 1969, the August 22nd ruling of Respondent Secretary of State Ted W. Brown was acknowledged and thereafter action was taken by the Stark County Board of Elections to order the limited number of five hundred (500) ballots for the judicial race in issue.

Pursuant to the provisions of Ohio law these ballots are now being used for voting absent servicemen's ballots and absent civilian and disabled voters. A copy of the ballot ordered by the Board of Elections on September 2, 1969, and presently being voted, lists as a candidate for the term beginning January 2, 1970, only the name of Harold DeHoff and one space for write-ins. (Appendix A-26)

On October 7, 1969 Anthony Flex filed a Petition in Mandamus in the Ohio Supreme Court praying for an order placing his name on the ballot as the Democratic Party Nominee.

ARGUMENT

A. The Respondent, Stark County Board of Elections Does Not Oppose Intervention of the Petitioner But Does Urge a Prompt Disposition of the Issues Raised by the Petitioner So That the November 4, 1969, General Election Is Not Delayed

Counsel for the Respondent Board of Elections has been instructed to advise the Supreme Court of the United States that the Board of Elections as a board does not oppose the motion of the petitioner to intervene as a party. Further, the two members of the board holding office by virtue of the recommendation made by the political party organization which the petitioner seeks to represent as its candidate in the non-partisan judicial election, individually favor the motion of the petitioner to intervene.

However, in any event, the court is urged to make prompt and final disposition of this litigation so as to not delay the November 4, 1969, general election for the office at issue.

Time remaining prior to the November election obviously does not permit a lengthy consideration by the Court unless the Court were to order the election delayed. To do so would require a special one-purpose election as no election requiring polling places to be open is scheduled until the May, 1970, primary, long after the new January 2, 1970, term for Canton Municipal Court Judge commences.

The additional cost of such a special election requiring the polling places to be open not only within the City of Canton but throughout the district covered by the Canton Municipal Court including the sur-

rounding seven townships, is estimated by the Director of the Stark County Board of Elections to be approximately $33,908.00. (Appendix C-7, infra. pg.).

B. As the Issue of Whether To Grant the Petitioner the Relief Requested Is Being Subjected to Adversary Scrutiny by the Other Parties, the Respondent Stark County Board of Elections Waives Argument on That Issue

The Respondent Stark County Board of Elections exists for the purpose of conducting elections in a manner consistent with law. However, the manner of selecting the four members of the Stark County Board of Elections pursuant to *Section 3501.07* often results in the members of the Board individually adopting a position on election disputes regarding candidates that is politically oriented in terms of allegiance to the political party that recommended their appointment. Such is the case in this issue.

In view of the fact that both sides of the issue of whether to grant the petitioner relief are being presented to this Court, the Respondent Stark County Board of Elections respectfully waives argument on the issue of whether the petitioner Clay E. Hunter should be granted a writ of certiorari and the relief sought.

CONCLUSION

The primary purpose of Respondents' brief is to submit a STATEMENT OF THE CASE with all relevant information and statutory citations to aid the Court in its deliberations.

The chief concern of the Respondent Board of Elections is to avoid the possibility of a special election for the office in issue and the resulting additional expenditure.

Thus, the Respondent Board of Elections respectfully urges a prompt decision so it may proceed to conduct the election when scheduled and consistent with judicial directions.

Respectfully submitted,

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Prosecuting Attorney of
Stark County, Ohio

Attorney for Respondent
Stark County Board of Elections

APPENDIX

APPENDIX A

Constitutional Provisions and Statutes

§ 3501.04 Chief election officer. (GC § 4785-6)

The secretary of state is the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV of the Revised Code. He shall perform these duties, in addition to other duties imposed upon him by law, without additional compensation.

§ 3501.06 Board of elections; vacancies. (GC § 4785-8)

There shall be in each county of the state a board of elections consisting of four qualified electors of the county, who shall be appointed by the secretary of state, as his representatives, to serve for the term of four years. On the first day of March in even-numbered years the secretary of state shall appoint two of such board members, one of whom shall be from the political party which cast the highest number of votes for the office of governor at the last preceding regular state election, and the other shall be from the political party which cast the next highest number of votes for the office of governor at such election. All vacancies filled for unexpired terms and all appointments to new terms shall be made from the political party to which the vacating or outgoing member belonged, unless there is a third political party which cast a greater number of votes in the state at the last preceding regular state election for the office of governor than did the party to which the retiring member belonged, in which event the vacancy shall be filled from such third party.

§ 3501.07 Party recommendations; appointment.

At a meeting held not more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the board of elections, or within fifteen days

after a vacancy occurs in the board, the county executive committee of the party entitled to the appointment may make and file a recommendation with the secretary of state for the appointment of a qualified elector. The secretary of state shall appoint such elector, unless he has reason to believe that the elector would not be a competent member of such board. In such cases the secretary of state shall so state in writing to the chairman of such county executive committee, with the reasons therefor, and such committee may either recommend another elector or may apply for a writ of mandamus to the supreme court to compel the secretary of state to appoint the elector so recommended. In such action the burden of proof to show the qualifications of the person so recommended shall be on the committee making the recommendation. If no such recommendation is made, the secretary of state shall make the appointment.

"Sec. 1901.07 Term of office of judge; nomination and election.

". . . If there are no charter provisions applicable, candidates for party nomination to the office of municipal judge shall file a declaration of candidacy and petition not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May, in the form prescribed by Section 3513.07 of the Revised Code. The petition shall be signed by at least one hundred qualified electors of the territory of the municipal court who are members of the same political party of which the candidate is a member, or by such electors equal in number to at least five per cent of the number of the votes cast for the candidate for governor of the same political party in such territory at the next preceding regular state election if such five per cent is less than one hundred, and such declaration of candidacy and petition shall be filed with the board of elections of the county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors. If no valid

declaration of candidacy is filed for nomination as a candidate of a political party for election to the office of municipal judge, or if the number of persons filing such declarations of candidacy for nominations as candidates of one political party for election to such office does not exceed the number of candidates which such political party is entitled to nominate as its candidates for election to such office, then no primary election shall be held for the purpose of nominating candidates of such party for election to the office, and such candidates shall be issued certificates of nomination in the manner set forth in section 3513.02 of the Revised Code. . . ."

"If there are no charter provisions applicable, the nominating petition of independent candidates for the office of municipal judge shall be filed not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May, in the form prescribed by section 3513.261 (3513.26.1) of the Revised Code. The petition shall be signed by qualified electors of the territory of the municipal court not less in number than one per cent of the number of electors who voted for governor at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number. No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section . . ."

"Sec. 3513.02 Certificates of nomination issued when no primary is held.

"If, in any odd-numbered year, no valid declaration of candidacy is filed for nomination as a candidate of a political party for election to any of the offices to be voted for at the general election to be held in such year, or if the number of persons filing such declarations of candidacy for

nominations as candidates of one political party for election to such offices does not exceed, as to any such office, the number of candidates which such political party is entitled to nominate as its candidates for election to such office, then no primary election shall be held for the purpose of nominating candidates of such party for election to offices to be voted for at such general election and no primary ballots shall be provided for such party. If, however, the only office for which there are more valid declarations of candidacy filed than the number to be nominated by a political party, is the office of councilman in a ward, a primary election shall be held for such party only in the ward or wards in which there is a contest, and only the names of the candidates for the office of councilman in such ward shall appear on the primary ballot of such political party.

"The election officials whose duty it would have been to provide for and conduct the holding of such primary election, declare the results thereof, and issue certificates of nomination to the persons entitled thereto if such primary election had been held shall declare each of such persons to be nominated as of the date of the ninetieth day before the primary election, issue appropriate certificates of nomination to each of them, and certify their names to the proper election officials, in order that their names may be printed on the official ballots provided for use in the next succeeding general election in the same manner as though such primary election had been held and such persons had been nominated at such election."

"Sec. 3501.11 Duties of board.

"Each board of elections shall exercise by a majority vote all powers granted to such board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall: . . . (K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers; . . . In all cases of a tie vote or a disagreement in the board,

if no decision can be arrived at, the clerk shall submit the matter in controversy to the secretary of state, who shall summarily decide the question and his decision shall be final."

"Sec. 3513.31 Vacancy by withdrawal, death, or resignation of nominee; selection of candidate for unexpired term.

". . . If a person nominated in a primary election as a candidate for election at the next general election, whose candidacy is to be submitted to the electors of a district within a county, withdraws as such candidate prior to the eightieth day before the day of such general election, the vacancy in the party nomination so created may be filled by a district committee consisting of those members of the county central committee in such county of the political party which made such nomination at said primary election who represent the precincts or the wards and townships within such district, at a meeting called for such purpose. Such district committee meeting shall be called by the chairman of such county central committee who shall give each member of such district committee at least two days' notice of the time, place, and purpose of such meeting. If a majority of the members of such district committee are present at such district committee meeting, a majority of those present may select a person to fill the vacancy. The chairman and secretary of such district committee shall certify in writing and under oath to the board of such county, not later than the seventy-sixth day before the day of such general election, the name of the person selected to fill such vacancy. Such certification must be accompanied by the written acceptance of such nomination by the person whose name is certified.

". . . If a person nominated in a primary election as a candidate for election at the next general election dies prior to the tenth day before the day of such general election

the vacancy so created may be filled by the same committee in the same manner as provided in the first five paragraphs of this section for the filling of similar vacancies created by withdrawalls. . . ."

APPENDIX B

DECLARATION OF CANDIDACY

Party Primary Election
For Judge or Clerk of the Municipal Court

To be filed with the Board of Elections not later than 4 P.M. of the Nintieth day before the day of the Primary Election

Revised Code 1901.07, .31; 3515.05, .07, .08, .09, .10

NOTE—The Candidate must fill in, sign and swear to his declaration before petitions are circulated.

I, Clay E. Hunter, the undersigned, hereby declare that
(Name of Candidate)
my voting residence is in L Precinct of the 5th Ward
(Township) or
in the County of Stark, Ohio; that my postoffice address
(Ward and City or Village) (Street
is 206 Millview Pl SW of the City of Canton, Ohio; that
and Number, if any, or Rural Route and Number) (City, Village or Postoffice)
I am a qualified elector in the precinct in which my voting residence is located. I am a member of the Democratic Party. I hereby declare that I desire to be a candidate for nomination as a candidate of the Democratic Party for election to the office of Judge of Canton Municipal Court District for the full term commencing January 2,
(full term commencing . . .) or (unexpired term ending . . .)
1970 in the city of Canton, Stark County, at the Primary Election to be held on the 6th day of May, 1969, and I hereby request that my name be printed upon the official primary election ballot of the said Democratic Party as a candidate for such nomination as provided by law.

I further declare that, if elected to said office, I will qualify therefor, and that I will support and abide by the principles enunciated by the Democratic Party in its National and State Platforms, and that I have not voted as a member of a different political party at any primary election within the next preceding four calendar years.

Dated this 30 day of December, 1968.

/s/ CLAY E. HUNTER
(Signature of Candidate)

The State of Ohio, County of Stark, ss.

Clay E. Hunter, being duly sworn, deposes and says
(Name of Candidate)
that he is the candidate named in the above declarations of candidacy and that the statements and declarations therein contained are true as he verily believes.

/s/ CLAY E. HUNTER
(Signature of Candidate)

Subscribed and sworn to before me this 30 day of December, 1968.

/s/ JAMES SECCOMBE
(Signature of Officer Administering Oath)
Director
(Title of Officer)

No. 69—321

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, on the Relation of
ROY E. MILLER
1415 - 25th Street, N.W.
Canton, Ohio 44709,
Relator,

v.

JOHN F. GWIN
1420 Fernwood Drive
Alliance, Ohio 44601

JAMES SECCOMBE
1439 Fulton Road, N.W.
Canton, Ohio 44703

CARL F. WISE
1308 Buena Vista Street, N.E.
Canton, Ohio 44714

EARLE E. WISE
5152 Eshelman Avenue, N.E.
Louisville, Ohio 44641

Forming a body known as
The Stark County Board of Elections, and

TED W. BROWN
Secretary of State
State House, Columbus, Ohio,

Respondents.

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Demurrer and Brief of Respondents John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, Forming the Body Known as the Stark County Board of Elections

Demurrer

Now Come the Respondents John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, forming the body known as the Stark County Board of Elections and demur to the petition of the Relator.

DAVID D. DOWD, JR.
David D. Dowd, Jr.
Stark County Prosecuting Attorney
Attorney for Board of Elections of
Stark County, Ohio

It is hereby agreed by the Respondents, John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise that the ruling on the demurrer heretofore filed in this action shall be dispositive of this action in accordance with the provisions of Section 4 of Article VIII of the Rules of the Supreme Court of Ohio.

Brief of Respondents in Support of Demurrer

(1) The Board of Elections Should Not Be Prohibited From Issuing a Certificate of Nomination to the Honorable Judge Clay E. Hunter.

Number One in the prayer of Relator's petition states as follows:

> "1. That a Writ of Prohibition issue against the Respondents, Ted W. Brown and the members of the Board of Elections of Stark County, Ohio, from issuing a certificate of nomination for the office of Judge of the Canton Municipal Court to Judge Clay E. Hunter;"

As indicated in the agreed statement of facts the Honorable Judge Clay E. Hunter was the only Democratic candidate for the office of Municipal Judge for the term for which he was a candidate and as a consequence he was entitled to a certificate of nomination following 4:00 p.m. on the ninetieth day before the primary election of May, 1969, pursuant to the provisions of *R. C. 1901.07* and *R. C. 3513.02*. The failure to give the Honorable Judge Clay E. Hunter a certificate of nomination does not negate the fact that he was entitled to receive the certificate in February of 1969. The failure to issue the certificate was clearly a failure to perform a ministerial act.

The election laws of the State of Ohio are designed to provide an orderly process in the control and conduct of primary elections and general elections. An obvious goal is to provide the voter in the general election with a choice in the elections of public officials.

Specifically, *R. C. 3513.31* sets forth a detailed process by which a candidate for the general election can be replaced in the event of his *withdrawal* or *death*.

In the absence of a certificate of nomination, it is questionable whether the Honorable Judge Clay E. Hunter is

in a position to withdraw as a candidate. Certainly he was entitled to be granted his certificate of nomination back in February of 1969. Then following the ruling of the Supreme Court of Ohio in *State ex rel Graves* v. *Brown,* 18 Ohio State 2d 61 (April 30, 1969) Judge Clay E. Hunter would have been in a position to determine whether or not to withdraw as a candidate. However, at this time, in the absence of a certificate of nomination, it is a cloudy issue as to whether Judge Hunter is even in a position to withdraw so as to permit his party, the Democratic party, to replace him on the ballot under the provisions of *R. C. 3513.31.*

Therefore, it is submitted that an orderly process in compliance with the spirit of the election laws of Ohio is to permit the Stark County Board of Elections to issue a certificate of nomination to Judge Clay E. Hunter so that he is then in a position to decide whether or not to withdraw. Then in the event of his failure to withdraw, the Stark County Board of Elections is in a position pursuant to the provisions of *Section 3501.11* and consistent with *State ex rel Janasik* v. *Sarosy,* 12 Ohio State 2d 5 (1967) to take action to remove the Honorable Judge Clay E. Hunter as a candidate if he refuses to withdraw.

The question of whether or not a "removed" candidate can be replaced by the party to which he belongs is apparently an unsettled question in the State of Ohio. A method by which this question can be avoided is simply for the candidate to withdraw, thereby giving his party the opportunity to replace him. However, if he is given no certificate of nomination in the first place, then the question arises as to whether or not he can withdraw if he did not receive a certificate of nomination. Therefore, it is submitted that the Stark County Board of Elections should not be prohibited from issuing a certificate of nomination to the Honorable Clay E. Hunter.

(2) In the event it is the decision of the Supreme Court of Ohio that a Certificate of Nomination should not be

issued to the Honorable Judge Clay E. Hunter, then the Democratic Party pursuant to the provisions of *R. C. 3513.31* should be permitted to select a candidate as a substitute for the Honorable Judge Clay E. Hunter for the office of Judge of the Canton Municipal Court at the general election of November, 1969.

Recognizing the possibility that this Court will determine that the decision of *State ex rel Graves* v. *Brown, supra,* will require that the court prohibit the Board of Elections of Stark County from issuing a certificate of nomination to the Honorable Judge Clay E. Hunter, then the question that arises is whether under the circumstances as set forth in the Agreed Statement of Facts the Democratic party by its central committeemen shall be permitted to substitute a candidate for Judge Hunter on the ballot for the November, 1969, general election, pursuant to *R. C. 3513.31.*

It should be noted at the outset that the Democratic voters at the May, 1969, primary had no opportunity whatsoever to cast a ballot for a candidate as a representative of their party for the November, 1969, election. In view of the fact that Judge Hunter was the only candidate filing petitions pursuant to the law, no ballot was submitted to the electorate so they did not even have the opportunity to write in a candidate and vote for him. The Board of Elections in not providing ballots for the Democratic party voters was following the mandate of *R. C. 1901.07* and *R. C. 3513.02.* At the time the Board of Elections made the decision to consider Judge Hunter as the only candidate for the Democratic party for the nomination so as to eliminate the necessity of providing a ballot for the Democratic voters, the Stark County Board of Elections was operating in compliance with the Opinion No. 68-110 of the Attorney General of the State of Ohio issued July 5, 1968, and also in compliance with the directive of Secretary of State Ted W. Brown in his bulletin dated January 15, 1969, as set forth in the Agreed Statement of Facts.

The subsequent decision of this court in *Graves* v. *Brown, supra,* was not to come until the 30th of April, 1969.

In the event Judge Hunter is to be denied a certificate of nomination by reason of the authority of *Graves* v. *Brown, supra,* the Democratic party will be without a candidate in the November, 1969, General Election for the office of Canton Municipal Court Judge unless the Democratic party is permitted the opportunity pursuant to the spirit of the provisions of *R. C. 3513.31* to select a substitute candidate.

It is submitted that consistent with the spirit of the elections laws of the State of Ohio and the directives issued by the chief elections official of the State of Ohio, Mr. Ted W. Brown, Secretary of State, that the Honorable Judge Clay E. Hunter was a candidate in the sense of *R. C. 3513.31* and should be considered as a candidate for the purpose of the question of whether or not he can be replaced.

Although *R. C. 3513.31* is silent on the question of whether a "removed" candidate in contrast to a "withdrawing" candidate can be replaced by a substitute, it is submitted that the Honorable Judge Clay E. Hunter, if removed by the order of this Court, should be considered as a "withdrawing" candidate so as to permit the Democratic party in the jurisdiction of the Canton Municipal Court to choose and select a substitute for the November election, thereby granting to the voters in the jurisdiction of the Canton Municipal Court a choice which otherwise is to be denied them through no fault of their own.

It is submitted that a strict interpretation of the provisions of *R. C. 3513.31* in this unique factual situation would be in direct conflict with the "Right to Vote" as described and stressed by the Supreme Court of the United States in its October, 1968, decision permitting the Ohio American Independent Party's Presidential candidate George Wallace the right to be on the Ohio, 1968, Presi-

dential ballot despite the party's failure to comply with the Ohio election laws. *Williams* v. *Rhodes*, 37 LW 4001, October 15, 1968.

In delivering the opinion of the Supreme Court, Judge Black stated in part as follows:

> ". . . In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. . . . Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined' . . . . The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote. . . ."

To interpret *R. C. 3513.31* strictly in the situation at hand would be to place a heavy burden on the right to vote. To avoid this pitfall, it is submitted that in this situation *R. C. 3513.31* should be interpreted so as to provide the Democratic party the right to substitute a candidate for Judge Hunter.

Therefore, that part of Relator's petition in prohibition which seeks an order stopping the political party to which Judge Hunter belongs from substituting a candidate by *R. C. 3513.31* should be denied.

Conclusion

The demurrer should be sustained as to all parts of Relator's petition. However, in the event the demurrer is overruled as to that part of Relator's prayer for relief which seeks the withholding of a certificate of nomination to Judge Hunter and an order striking Judge Hunter's name from the ballot for the November election, then the demurrer should be sustained as to that part of Relator's petition which seeks to deny the Democratic Party the right to select a substitute candidate for Judge Hunter.

Respectfully,

David D. Dowd, Jr.
Prosecuting Attorney of Stark County
Attorney for Respondents,
Stark County Board of Elections

Agreed Statement of Fact as Between Relator and John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, Forming the Body Known as the Stark County Board of Elections

It is agreed by and between Harry W. Schmuck, as counsel of record for Roy E. Miller, Relator, and David D. Dowd, Jr., Prosecuting Attorney of Stark County, Ohio, as the Attorney for John F. Gwin, James Seccombe, Carl F. Wise and Earle E. Wise, forming the body known as the Stark County Board of Elections as follows:

(1) That the Honorable Judge Clay E. Hunter was and is a duly elected, qualified Judge of the said Municipal Court of the City of Canton and that his term expires January 2, 1970.

(2) That the Honorable Judge Clay E. Hunter on the 30th day of December, 1968, declared himself to be a candidate for re-election and took out nominating petitions to succeed himself as a Judge on the bench of the said Municipal Court of Canton as a candidate representing the Democratic party and that he filed said nominating petitions with the Board of Elections on the 22nd day of January, 1969.

(3) That thereafter the Board of Elections of Stark County determined that the said nominating petitions filed by the Honorable Judge Clay E. Hunter were in order in that they contained sufficient signatures of registered Democratic voters residing in the jurisdiction of the Canton Municipal Court and that such determination was made by the Board of Elections of Stark County on the 7th day of February, 1969, and duly entered on the minute journal of the Board of Elections of Stark County.

(4) That no other Democratic candidate took out or filed nominating petitions for the position of Judge of the Municipal Court of Canton, Ohio, for the term for which the Honorable Judge Clay E. Hunter declared as a candidate.

(5) That pursuant to the provisions of *R. C. 1901.07* and *R. C. 3513.02* no primary election was held for the purpose of nominating a Democratic candidate for said office and no primary ballots were provided to members of the Democratic party voting in May, 1969, primary. That no opportunity was afforded to the members of the Democratic party residing in the jurisdiction of the Canton Municipal Court and voting in the May, 1969, primary to cast votes for a write-in candidate to represent the Democratic party in the November general election.

(6) That as of the last date for filing petitions for the May, 1969, primary, and up to and through the date of the May, 1969, primary no challenge was filed to the candidacy of the Honorable Judge Clay E. Hunter, nor was any investigation undertaken by the Board of Elections of Stark County to determine the age of the Honorable Judge Clay E. Hunter.

(7) That on July 5, 1968, the Attorney General for the State of Ohio, William B. Saxbe, issued a formal opinion known as Attorney General opinion no. 68-110 to Mr. Ted W. Brown, Secretary of State, Columbus, Ohio, in which the syllabus states as follows:

> "SYLLABUS: A judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected."

(8) That on January 15, 1969, Mr. Ted W. Brown as Secretary of State of Ohio issued an information bulletin, a copy of which is attached hereto as Exhibit 1, and in which the following opinion was set forth:

> "It is, therefore, our opinion that a municipal court judge who is presently holding office may be re-elected

at the General Election in 1969 for one additional term for judge of the same court, irrespective of the fact that the judge will be over 70 years of age prior to the time that he will be re-elected to the office."

(9) That the Stark County Board of Elections in response to a directive dated May 5, 1969, from Mr. Ted W. Brown, Secretary of State of Ohio inquired of the Honorable Judge Clay E. Hunter as to his date of birth and has been advised by the Honorable Judge Clay E. Hunter that his date of birth is January 14, 1895.

(10) That the Stark County Board of Elections, despite the instructions contained in *R. C. 1901.07* and *R. C. 3513.02* did not issue a certificate of nomination to the Honorable Judge Clay E. Hunter in February of 1969 after the last day for filing petitions for the May primary had passed.

(11) That as of this date the Honorable Judge Clay E. Hunter has not been removed from the ballot by action of the Stark County Board of Elections nor has the Honorable Judge Clay E. Hunter withdrawn as a candidate for the office of Canton Municipal Court Judge.

Respectfully submitted,

DAVID D. DOWD, JR.
David D. Dowd, Jr.
Stark County Prosecuting Attorney
Attorney for Respondents, Stark
County Board of Elections

HARRY W. SCHMUCK
Harry W. Schmuck
Counsel for Relator, Roy E. Miller

DEPARTMENT OF STATE
STATE OF OHIO
office of
SECRETARY OF STATE

July 7, 1969

Columbus 43215

Stark County Board of Elections
Court House Annex
Canton, Ohio 44702

Attention Mr. John J. Waldeck, Director

Gentlemen:

I am in receipt of your two letters of July 2, one certifying a tie vote on issuing a certificate of nomination to Clay E. Hunter, and the other certifying a tie vote on issuing certificates of nomination to all other successful candidates. I will deal with these tie votes separately.

Clay E. Hunter was not involved in a primary election. Subsequent to the date when a primary would have been held, if his party had been required to participate in one, Clay E. Hunter's name was ruled off the ballot by the Ohio Supreme Court in Action No. 69-321 entitled, The State of Ohio, ex rel. Roy E. Miller v. John F. Gwin, et al.

I am of the opinion that the issuance of the certificate of nomination is a ministerial act to be performed by the Board of Elections. Such act is evidence to the candidate and to the world that the Board of Elections regards such candidate as being nominated. Had Clay E. Hunter not been removed by the Supreme Court as a candidate, he would have been entitled to a certificate of nomination as of the date of the ninetieth day before the primary election in accordance with Section 3513.02 of the Revised Code.

If the Stark County Board of Elections were to issue a certificate of nomination to Clay E. Hunter after the

Ohio Supreme Court has declared that he is not eligible to be a candidate, and after said Court has prohibited the Stark County Board of Elections from placing his name on the ballot, the Board's act could be construed as an act in defiance of the Court's order. It might also accomplish the purpose of misleading the candidate and the voters of Stark County as to the validity of Clay E. Hunter's candidacy. I can see no useful purpose in issuing such a certificate of nomination which may be construed as misleading or an act in defiance of a court order. For this reason I vote "NO" with Carl F. Wise and James Seccombe against John Gwin's motion to issue a certificate of nomination to Clay E. Hunter.

The next tie vote resulted on a motion by Carl Wise that certificates of nomination be issued to all successful candidates who filed expense account statements except Clay E. Hunter, candidate for Canton Municipal Court Judge. As I indicated previously, the issuance of certificates of nomination is a ministerial act performed by the Board. The purpose of the act is to serve notice on the candidate and the voters that those candidates who have complied with the statutes are declared by the Board of Elections to be nominated. I can see no purpose in the Board's refraining from issuing certificates of nomination to those candidates who are entitled; and indeed, I am of the opinion that the Board of Elections would be derelict in its duty if it did not issue such certificates.

Charles H. Morehouse, unopposed American Independent Party candidate, did not file an expense statement, apparently under the belief that he was not required to since there was no primary election contest for his party. I am of the opinion that Charles H. Morehouse is entitled to a certificate of nomination and that he is not required to file a statement of receipts and expenditures in order to obtain such certificate. Section 3513.02 of the Revised

Code provides that the board of elections shall issue a certificate of nomination to candidates who have not participated in a primary election, as if such primary election had been held, and shall declare each such person to be nominated as of the date of the ninetieth day before the day of the primary election date. Section 3517.10 of the Revised Code requires every candidate who received or expended any money in connection with his nomination or election to file a statement of such receipts and expenditures within forty-five days after the election at which he was nominated. We conclude that Charles H. Morehouse was not nominated at an election but was nominated pursuant to the provisions of Section 3513.02 of the Revised Code, as though there was an election, with the time of his nomination being fixed by statute as ninety days preceding the date of the primary election. Therefore, since Charles H. Morehouse's candidacy was not at issue on the date of the primary election, he is not required to file a statement of receipts and expenditures within forty-five days after said election.

We recognize that our decision in regard to Charles H. Morehouse's candidacy is a reversal of our previous position on such candidates, recorded in the March 1, 1959, issue of the Brown Ballot Box, at page 733. A matter which troubled us at that time was moneys which may have been received or expended by a candidate even though a primary election would not be held for such candidate. Such receipts and expenditures would obviously have to be accounted for and reported by the candidate; and we feel that such accounting may be made more logically within forty-five days subsequent to the election at which the candidate has his candidacy at issue.

For the aforesaid reasons we, therefore, vote "YES" with Carl F. Wise and James Seccombe that certificates of nomination be issued to all successful candidates, in-

cluding Charles H. Morehouse, and excepting Clay E. Hunter.

Very truly yours,

TED W. BROWN
Ted W. Brown
Secretary of State

TWB
mm

Stark County Board of Elections
Stark County Courthouse
Canton, Ohio

The undersigned hereby certify that at a meeting held on August 14, 1969 by the duly elected committeemen of the Canton Municipal Court District subdivision of the Stark County Democratic Central Committee, called for the purpose of selecting a candidate for Canton Municipal Court Judge in said Canton Municipal Court District to fill a vacancy created by the Supreme Court of Ohio decision removing the name of Clay E. Hunter from the race, at least 2 days notice of said meeting having been given to each committeeman in said district, the following person was unanimously selected to fill said vacancy:

ANTHONY FLEX
1112 Ellenhurst N.E.
Canton, Ohio

The undersigned further certify that a majority of said committeemen elected JOHN N. MEEKS as chairman of said meeting and elected ROY GUTIERREZ as secretary of said meeting, following which a majority of said committeemen cast a majority vote for the said ANTHONY FLEX as provided in Section 3513.31 of the Revised Code of Ohio.

STATE OF OHIO
STARK COUNTY

JOHN N. MEEKS and ROY GUTIERREZ being first duly sworn, depose and say that they are the duly elected, qualified and acting chairman and secretary respectively of the Democratic Committee Organization of the Canton Municipal Court Subdivision of the Stark County Democratic Central Committee, and that the facts and statements contained herein are true.

JOHN N. MEEKS
ROY GUTIERREZ

Sworn to before me and subscribed in my presence this 14th day of August 1969.

MARGARET L. NEIL
Notary Public

My Commission expires 8-22-72.

I ANTHONY FLEX who reside at 1112 Ellenhurst N. E., Canton, Ohio, in Stark County, Ohio, do hereby accept and consent to be a candidate for the office of Canton Municipal Court Judge and do hereby give my consent and request my name be placed on the ballot for such office, at the general election to be held on November 4th, 1969.

ANTHONY FLEX
Name

AUGUST 14, 1969
Date

DEPARTMENT OF STATE
STATE OF OHIO
OFFICE OF
SECRETARY OF STATE

August 22, 1969

Columbus 43215

Stark County Board of Elections
Court House Annex
Canton, Ohio 44702

Attention Mr. John J. Waldeck, Director

Gentlemen:

I am in receipt of your letter of August 20 posing a tie vote on a motion by Earle Wise "That the name of Anthony Flex be put on the ballot for the November 4, 1969 General Election for Judge of the Canton Municipal Court for the term beginning January 2, 1970." Earle Wise and John Gwin voted for the motion while Carl Wise and Jim Seccombe voted against the motion.

I am in agreement with the reasoning of Carl Wise. Ohio Revised Code Section 3513.31 is controlling as it pertains to the right of parties to fill vacancies created by the withdrawal or death of a candidate. The statute makes no provision for filling a vacancy where the candidate has been found to be ineligible and has been removed by the Supreme Court of Ohio. Judge Clay E. Hunter neither resigned nor died but instead was removed by the Ohio Supreme Court; and consequently, there is no authority under statute which would permit the Democrat Party to fill the vacancy created by his removal.

The federal decisions rendered in the Wallace v. Rhodes case found certain of Ohio's statutes overly restrictive and, therefore, unconstitutional; but Section 3513.31 of the Ohio Revised Code was not one of those statutes affected in the Wallace v. Rhodes decision. It is certainly not the

function of the Secretary of State or the Board of Elections to determine that a statute is unconstitutional as constitutionality may only be determined by a court of competent jurisdiction.

On May 5, 1969, subsequent to the decision rendered by the Supreme Court in the case of Graves v. Brown, I advised boards of elections by directive that those candidates who had been nominated for judicial office and who were 70 years of age or older should be given the opportunity to resign as candidates so that the vacancies created by their resignations could be filled by their political parties. If Clay Hunter had resigned prior to being removed by a decision of the Court or the Board of Elections, his political party could have filled the vacancy created by his resignation in accordance with the provisions of Section 3513.31 of the Revised Code. I would have supported the vacancy being filled under those circumstances. However, I cannot support an effort to fill such vacancy when that vacancy results from the candidate being removed from the ballot by the Ohio Supreme Court.

In my judgment the statute does not authorize filling such vacancy in such instanee. For the aforesaid reasons, I vote "NO" with Carl Wise and James Seccombe against placing the name of Anthony Flex on the November ballot.

If I can be of further assistance, please advise.

Very truly yours,

TED W. BROWN
Ted W. Brown
Secretary of State

OFFICIAL JUDICIAL NON-PARTISAN BALLOT

Canton City

Stark County, Ohio

a. To vote for a candidate place "X" in the rectangular space at the left of the name of such candidate.

b. To cast a write-in vote place "X" in the left blank and write the candidate's name in the space provided.

c. If you tear, soil, deface, or erroneously mark this ballot return it to the precinct election officers and obtain another ballot.

USE "X" ONLY IN MARKING BALLOT

For Judge of Municipal Court

(Full term commencing January 1, 1970)

(Vote for not more than one)

	CHARLES K. CORRELL

For Judge of Municipal Court

(Full term commencing January 2, 1970)

(Vote for not more than one)

	HAROLD E. DeHOFF

Affidavit

John J. Waldeck, of 1524 11th Street, N. W., Canton, Ohio, first being duly sworn, deposes and says as follows:

(1) That he is the duly appointed and qualified Director of the Board of Elections of Stark County, Ohio.

(2) That an election for Judges of the Canton Municipal Court for the terms beginning January 1, 1970, and for the term beginning January 2, 1970, is in process for the general election Tuesday, November 4, 1969.

(3) That the ballot for said election is a double ballot containing both judge's offices for said terms in said district.

(4) That the Stark County Board of Elections has contracted with the Manos Printing Company of Canton, Ohio, for the printing of ballots for said Judicial Election in the amount of 107,530 ballots at the rate of $43.01 per thousand.

(5) That there are approximately 93,547 registered voters in said Canton Municipal Court District.

(6) That there are 301 polling places in said Court District, consisting of seven townships with three cities.

(7) That a special election for said Canton Municipal Court District would include the following items and approximate costs:

1. Minimum of four (4) poll workers for each of the 301 polling places, being 1204 workers at the rate of $18.00 per diem equals	$21,672.00
2. Judges fees being at the rate of $2.00 each for 301 polling places equals	602.00
3. 107,530 ballots at the rate of $43.01 per thousand equals	4,624.00
4. Other election expense consisting of janitor services, rent, mileage, light, heat with average of $10.00 per polling place equals	3,010.00
5. Other election expense consisting of packing suitcases, election supplies, setting up voting booths, legal advertising, extra help for vote talley any final count	4,000.00
TOTAL	$33,908.00

Further, Affiant sayeth not.

JOHN J. WALDECK
John J. Waldeck
Director of Stark County Board of Elections

SWORN to before me this 6th day of October, 1969.

JOAN ZENGLER
Notary Public,
Stark County, Ohio

My Commission Expires 12-8-71